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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

125

No. [redacted]

MORTON BERKOWITZ,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

MORTON BERKOWITZ, the petitioner, also known as Morton Berke,*[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

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* Numbers followed by the letter "a" refer to the pages in the Consolidated Appendix, a part of the certified transcript of the United States Court of Appeals for the Third Circuit.

1. Paragraph III of the complaint, p. 9a.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is found at 328 F. 2d 358 and is printed as Appendix A to this petition. The opinion of the United States District Court for the Eastern District of Pennsylvania denying respondent's motion to transfer the instant action to the Eastern District of New York under 28 U.S.C. §1404(a) is found at 214 F. Supp. 579 and is printed in Appendix B to this petition. The opinion of the said District Court denying respondent's motion for such transfer under 28 U.S.C. §1406(a) is found at 215 F. Supp. 615 and is printed in Appendix C to this petition. The judgment of the United States Court of Appeals is printed as Appendix D to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on February 5, 1964. The petition for rehearing was denied on March 23, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

In an action instituted by the respondent in the Eastern District of Pennsylvania to recover a penalty assessment made against the petitioner, pursuant to §6672 of the Internal Revenue Code of 1954, the District Court determined that it had no jurisdiction over the person of the defendant. It quashed service of the summons and complaint and denied respondent's motions to transfer the action to the Eastern District of New York under Title 28 U.S.C. §§1404(a) and 1406(a).

The questions presented by this petition are (1) whether the District Court for the Eastern District of Pennsylvania, having jurisdiction over the subject matter and venue, had the power to transfer the case under 28 U.S.C. §1404(a) without having obtained jurisdiction over the person of petitioner and (2) whether the language "[f]or the convenience of parties and witnesses, in the interest of justice" in §1404(a) was intended to permit a transfer of venue for the sole purpose of saving respondent from the meaning of the statutory period of limitations.

Statutes Involved

Section 1396 of 28 U.S.C. provides as follows:

> Any civil action for the collection of internal-revenue taxes may be brought in the district where the liability for such tax accrues, in the district of the taxpayer's residence, or in the district where the return was filed.

Section 1404(a) of 28 U.S.C. provides as follows:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Section 1406(a) of 28 U.S.C. provides as follows:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Statement of the Case

Respondent's District Director of Internal Revenue at Philadelphia, Pa., assessed petitioner, on May 31, 1956, $63,653.73 based on a claim that he was a responsible officer of Rudolph Motor Service Inc., a corporation which had become delinquent in the payment of withholding taxes for the period March 31, 1953 through June 30, 1954.[2] Petitioner, thereupon, duly filed a notice of protest with the District Director seeking a hearing by the Appellate Division of the Regional Commissioner's office[3] as permitted by law.

Petitioner's attorney, over a period of six years, and at least once a year, pleaded in writing with the appropriate authorities to have the protest heard,[4] so that he could establish that the assessment was charged against the wrong person. Each of these requests was denied.[5] Despite such wilful refusal, the Government, just 18 days before the end of the six-year period of limitations, filed a complaint at the United States District Court for the Eastern District of Pennsylvania,[6] seeking to reduce to judgment the very assessment which petitioner had protested for almost six years he did not owe.

Petitioner, who had had his permanent address in Philadelphia, obtained employment in New York prior to 1960, married there and, continuously, since January 10, 1960 resided with his wife at 430 Ocean Parkway, Brooklyn 18, New York.[7] He filed income tax returns for every

2. Paragraph IV of the complaint, pp. 9a and 10a.
3. Affidavit of Morton Berke, para. 6, pp. 17a and 18a.
4. Affidavit of Morton Berke, para. 7, p. 18a.
5. pp. 21a, 22a.
6. pp. 9a-12a inclusive.
7. Affidavit of Morton Berke, para. 3 and 4, pp. 16a, 17a.

tax year since that date with respondent's Brooklyn District Director.[8] These gave his social security number. The Government could, if it desired, ascertain petitioner's residence from its social security records. Petitioner had filed income tax returns for many years and all these noted his social security number. No attempt, apparently, had been made by respondent to ascertain petitioner's present address.

The respondent did not dispute any of the aforementioned facts.

The summons and complaint was served in Philadelphia, on petitioner's sister, with whom he had not been living for at least two and one-half years, on June 15, 1962,[9] two weeks after the termination of the statute of limitations. Petitioner on learning of the action, moved to dismiss it for absence of proper service.

Two months later, the respondent moved under 28 U.S.C. §1404(a), to transfer the action to the United States District Court for the Eastern District of New York.[10] The District Court deemed the motion to dismiss as one to quash service and granted same and, at the same time, denied respondent's motion to transfer.[11] The Government then moved to transfer under §1406(a). That too was denied.[12]

Respondent appealed to the United States Court of Appeals for the Third Circuit from both orders, received permission from that Court, and filed with it a petition for a writ of mandamus. Petitioner filed timely motions

8. Affidavit of Morton Berke, para. 4, p. 17a.
9. Affidavit of Gertrude Paul, para. 6, p. 27a.
10. pp. 28a, 29a.
11. p. 30a.
12. pp. 41a-44a inclusive.

to dismiss the appeals because they were from interlocutory orders.

The Court of Appeals denied the two motions and dismissed the petition for a writ of mandamus. It ruled that the District Court had the power to transfer under §1404(a), despite absence of jurisdiction over the person of the defendant, and remanded the action to the District Court to pass on respondent's motion and determine whether it should exercise its discretion to transfer the action to the United States District Court for the Eastern District of New York. It did not act upon respondent's appeal under §1406(a).

Reasons for Allowing a Writ

1. The Court of Appeals imposed an unwarranted interpretation upon an important federal procedural statute.

2. The decision below conflicts with a decision by the Court of Appeals for the District of Columbia and with decisions of district courts in the 2nd, 6th, 7th and 8th Circuits. It is supported however by a decision of the Court of Appeals for the 5th Circuit.

1. The Court of Appeals Imposed an Unwarranted Interpretation Upon an Important Federal Procedural Statute.

The 671 references to §1404(a) in Shepard's United States Citations, Statutes, to April 1964,[13] and the views of one of the judges who has been called upon frequently

13. 620 of the 671 citations were reported prior to 1964. 14 of these were by this Court, 131 by courts of appeals and 422 by district courts. The balance were to various legal periodicals. The reported instances in 1964 until April, credit 2 to this Court, 10 to courts of appeals and 25 to district courts.

to consider it,[14] leave no room for doubt of the importance of that section as a federal procedure statute. This Court found it necessary to interpret the section for various purposes.[15] It has not passed upon the question whether the section confers upon the district court the power to transfer, absent personal jurisdiction over the defendant. It is respectfully submitted that the statute, which has as its primary objective authority in the district court to transfer any civil action for the convenience of parties and witnesses, in the interest of justice, does not authorize such transfer when the transferor court does not have jurisdiction over the person of the defendant. The legislative history of the section does not touch upon that question. Nor was the language "[f]or the convenience of parties and witnesses, in the interest of justice" intended to permit a transfer of venue for the sole purpose of saving respondent from the running of the statutory period of limitations.

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14. Kaufmann—Observations on Transfer Under Section 1404(a) of the New Judicial Code (1951).

15. *Ex Parte Collett*, 337 U. S. 55 (1949); *Boyd* v. *Grand Trunk Western Railroad Co.*, 338 U. S. 263, 266 (1949); *Southern Ry. Co.* v. *Mayfield*, 340 U. S. 1, 2 (1950); *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U. S. 180, 186 (1952); *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379 (1953); *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514, 522 (1953); *Polizzi* v. *Cowles Magazines*, 345 U. S. 663, 670 (1953); *Norwood* v. *Kirkpatrick*, 349 U. S. 29 (1955); *United States* v. *DuPont Co.*, 351 U. S. 377, 378 (1956); *Hoffman* v. *Blaski*, 363 U. S. 335 (1960); *Continental Grain Co.* v. *Barge FBL-585*, 364 U. S. 19 (1960); *Parsons* v. *Chesapeake & Ohio R. Co.*, 375 U. S. 71 (1963); and *Van Dusen* v. *Barrack*, 84 S. Ct. 805 (1964).

A. The District Court Lacks Statutory Authorization to Order Transfer Under §1404(a) in the Absence of Personal Jurisdiction Over the Defendant.

This Court in an opinion by Mr. Justice Brandeis in *Robertson* v. *Railway Labor Board*, 268 U. S. 619 (1925), unanimously held that a defendant in a civil action cannot be subjected to the jurisdiction of a district court *in personam*, except by service on him within the district. That rule was established by the Judiciary Act of September 24, 1789, in accordance with the practice at common law and was deemed by Mr. Justice Brandeis to have been the general rule ever since. The Learned Justice said on pages 622 and 623:

> "• • • Congress clearly has the power to authorize a suit under a federal law to be brought in any inferior court. Congress has power, likewise, to provide that the process of every district court shall run into every part of the United States. Toland *v.* Sprague, 12 Pet. 300, 328; United States *v.* Union Pacific R. R. Co., 98 U. S. 569, 604. But it has not done so • • • by any general law • • •."
>
> "In a civil suit *in personam* jurisdiction over the defendant, as distinguished from venue, implies, among other things, either voluntary appearance by him or service of process upon him at a place where the officer serving it has authority to execute a writ of summons. Under the general provisions of law, a United States district court cannot issue process beyond the limits of the district • • • and a defendant in a civil suit can be subjected to its jurisdiction *in personam* only by service within the district. Toland *v.* Sprague, 12 Pet. 300, 330. Such was the general rule established by the Judiciary Act of September 24, 1789 • • • in accordance with the practice at common law. Piquit *v.* Swan,

> 5 Mason 35, 39 et seq. And such has been the general rule ever since. Munter *v.* Weil Corset Co., 261 U. S. 276, 279. No distinction has been drawn between the case where the plaintiff is the Government and where he is a private citizen."

There is nothing in the text of §1404(a) which changed the aforementioned requirement. That section was drafted in accordance with the doctrine of *forum non conveniens* to permit transfer to a more convenient forum, even though the venue was proper and does not concern itself with jurisdiction.

The question of jurisdiction over the person of the defendant was considered in many cases when the district courts were asked to apply the doctrine of *forum non conveniens*. The courts held that its consideration presupposed at least two forums in which the defendant was amenable to process.[16] That prerequisite was not eliminated by the enactment of §1404(a).[17]

A motion under §1404(a) may be considered only if the district court had personal jurisdiction over the defendant. This conclusion was not only reached by Judge Lord in the District Court in the instant case[18] but was the determining factor in the denial of similar motions in many other cases.[19]

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16. *North Branch Products Inc.* v. *Fisher*, 284 F. 2d 611 (D. C. Cir. 1960); *Maziński* v. *Dight*, 99 F. Supp. 192 (W. D. Pa. 1951).

17. *Rogers* v. *Halford*, 107 F. Supp. 295 (E. D. Wis. 1952); *Wilson* v. *Kansas City Southern Ry. Co.*, 101 F. Supp. 56 (W. D. Mo. 1951); *Wilson* v. *Seas Shipping Co.*, 78 F. Supp. 464 (E. D. Pa. 1948); and in *Hill* v. *Upper Mississippi Towing Corp.*, 141 F. Supp. 692 (D. Minn. 1956).

18. *United States* v. *Berkowitz*, 214 F. Supp. 579.

19. *Kings Bros. Productions, Inc.* v. *R. K. O. Teleradio Pictures, Inc.*, 208 F. Supp. 271, 277 (S. D. N. Y. 1962); *Hargrove* v. *Louisville & N. R. Co.*, 153 F. Supp. 681 (W. D. Ky. 1957); *Fistel* v. *Beaver Trust Co.*, 94 F. Supp. 974 (S. D. N. Y. 1950).

B. The Legislative History of §1404(a) Proves That This Section Was Not Intended as a Plaintiff's Remedy to Cure Defective Service.

The congressional action resulting in §1404(a) was necessary to reach certain proper venue cases which this Court had held then existing law could not be stretched to reach because this Court had expressly delimited the powers which Congress alone could enlarge.[20]

Just as it was impossible to stretch the clear meaning of these venue provisions in the FELA, or the Clayton Act, it was not possible to stretch the clear meaning of §1404(a), in spite of its legislative history as a transfer for convenience of witnesses and parties section, to make it over into a section for transfers to effect service of process.

In this respect, §1404(a) differs in two ways from §1406(a): in its legislative history, and in the express nature of its language. The legislative history of §1404(a) is different because it was connected with discretionary transfers where the case was properly before the court. This is made apparent in the report from the Committee on the Judiciary of the House of Representatives which accompanied the bill to enact into law Title 28 of the United States Code, which reads as follows:

> "Subsection (a) was drafted in accordance with the doctrine of *forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see Baltimore & Ohio R. Co. *v.* Kepner, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in

20. *Baltimore & Ohio R. Co.* v. *Kepner* 314 U. S. 44 (1941).

> Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, *and further*, that it is in the interest of justice to do so." (emphasis supplied)

Section 1404(a) is the creation of Professor Moore. Its genesis and purpose as a *forum non conveniens* statute has been set down by Professor Moore in his "Commentary on the U. S. Judicial Code" (Albany, 1949) where he stated:

> "This [1404a] is a clear recognition that the doctrine of *forum non conveniens* is a facet of venue; and that it involves elements of convenience to all concerned. * * * Subsection (a) of §1404 goes beyond prior practice in that its principles apply to 'any civil action'; and it alters the prior practice of dismissal of an action because of *forum non conveniens*." pp. 201-202

> "The statutory need for recognition of the doctrine of *forum non conveniens* grew out of the fact that while the venue chosen by a plaintiff may be a proper one it may be a very inconvenient forum for the defendant, for witnesses, and even for the plaintiff—the plaintiff being willing to bear the inconvenience in the hope of a larger verdict or for some other reason unrelated to a prompt and impartial trial. * * * A sensible treatment was to refrain from narrowing the choice of venue or from attempting to restrict the developed principles as to when a defendant is amenable to service of process, but to give the district court the power to exercise a broad discretion in light of all relevant factors and, where these warranted, to transfer, not dismiss, to a proper and more convenient forum. Subsection (a) of §1404 has done this." pp. 202-203.

Professor Moore did not then discuss the question of personal jurisdiction of the transferor court over the defendant because that question was settled by this Court in *Gulf Oil Corp.* v. *Gilbert*[21] by the statement of Mr. Justice Jackson for the Court on pages 506 and 507:

> "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; * * *"

Section 1404(a) did not alter the need of the transferor court acquiring jurisdiction over the defendant. The learned professor, in his 1961 Edition of Moore's Federal Practice,[22] contends that this principle should no longer prevail and cited cases in which his present view is both supported and opposed. His suggested change is not supported by any decision of this Court.

The four cases leading up to §1404(a)'s enactment into law support a legislative history-finding that is devoid of any intention to legislate a cure for improper service of process without investigation of defendant's place of residence after the statute of limitations has run.

In the case relied on by Professor Moore and the Revisers, *Baltimore & Ohio R. Co.* v. *Kepner, supra,* there was (i) proper service, (ii) proper venue, and (iii) defendant requested application of *forum non conveniens.* This Court held that under such circumstances, the courts could *not* enjoin prosecution of an FELA case brought in one of the alternatively permissible districts just because the trial would be more convenient elsewhere, on

21. 330 U. S. 501 (1947).

22. *Moore's Federal Practice,* 2nd Ed., 1961, Vol. 1, ¶ 0.145 [6.-2] p. 1791.

the ground that authority for this must come from the legislature.

The second case, while the proposal for §1404(a) was still pending, was *Gulf Oil Corp.* v. *Gilbert.*[23] In this case, a diversity action for law damages was involved. Again, there was (i) proper service, (ii) proper venue, and (iii) defendant requested application of the doctrine. This Court upheld a discretionary dismissal for *forum non conveniens,* where the district court had no substantive contact with the cause of action and both the Pennsylvania defendant and the Virginia plaintiff would be required to produce Virginia witnesses to a Virginia accident in the New York district court. Defendant's showing that the trial would be more convenient in Virginia supported the judge's discretionary application of the doctrine.

The third case was *Koster* v. *Lumbermens Mutual Co.*[24] This was a diversity case in a stockholders derivative suit. Plaintiff stockholder brought his suit in the Eastern District of New York where he resided and served the moving defendant corporations. Again, there was (i) proper service, (ii) proper venue, and (iii) the defendants requested application of the doctrine. The trial court's discretionary dismissal was affirmed by the Supreme Court.

The fourth case was *U. S.* v. *National City Lines,*[25] handed down a few days before enactment of the Code. This was an anti-trust case, involving choice of venue, as did Kepner, and understandably followed Kepner. The court below had dismissed for *forum non conveniens,* although it had proper service and proper venue. This Court held, that in the absence of congressional action,

23. 330 U. S. 501 (1947).
24. 330 U. S. 518 (1947).
25. 334 U. S. 573 (1948).

there was no power to transfer the case from the district chosen by plaintiff and permitted by the venue provisions of the Clayton Act, even though the *trial* convenience of all parties and witnesses would be better served elsewhere.

The one thing that is conspicuously absent in all of these cases is lack of jurisdiction over the person. In each and every case the moving defendant was properly served. In each and every case, venue was proper in the district in which plaintiff brought his action *whether or not that venue was an optional one under a special venue statute.*

Far from being unaware of the problem of choice of venue created by the existence of multiple venue provisions, the framers and proponents of §1404(a) devised it to meet that precise situation, at the very least as portrayed in the Federal Employer's Liability Act multiple-choice situation of the *Kepner* case, and probably as borne out in the diversity multiple-choice of the *Gulf Oil* case[26] and in the stockholders multiple-choice of the *Koster* case.[27] They could have addressed themselves to the problem of improper venue suits in this same section. However, they did not do so. They could have addressed themselves to the problem of proper venue with inability to serve. However, they did not do so. There is nothing in the express language of the statute to permit any inference that they intended to do so; there is nothing in the legislative history nor in the background cases to permit any inference that they intended to do so.

Consequently, the latitude available to this Court in the *Goldlawr, Inc.* v. *Heiman*[28] decision under §1406(a) is not available to the courts under §1404(a). The solution to the anomaly lies not to rewrite §1404(a), but in the

26. 330 U. S. 501 (1947).
27. 330 U. S. 518 (1947).
28. 369 U. S. 463 (1962).

legislative powers themselves. This conclusion is also demanded by the other major way in which §1404(a) differs from §1406(a). The express language of §1406(a) deals with required transfers. The transfers must be made if it is in the interest of justice to do so. Section 1404(a) deals with discretionary transfers. The transfers may be made if (1) it is for the convenience of the witnesses and parties, and (2) if it is in the interest of justice to do so. The more recent addition of the "interest of justice" language to §1406(a) leaves a much greater degree of vagueness to give rise to a statutory construction that reaches cases *not* included within §1404(a). The earlier language of §1404(a), on the other hand, so expressly directed itself to the *forum non conveniens* problem for trial of an action that no addition of the terms "in the interest of justice" can be interpreted to deprive it of its specific and express limits, to wit, to cases where (a) the convenience of the witnesses and parties is served, and (b) the judge feels it equitable on the individual facts of the case before him to serve those interests.

Finally, the legislative history and background of §1404(a) does not support the unique argument that §1406(a) was intended to deal with cases of venue that were proper by multiple-choice venue provisions but in which venue in a particular instance might be inconvenient. The Congress was aware of the multiple venue problems raised in the *Kepner* case[29] when it passed §1404(a), and decided to limit transfers, provided venue whether permitted in only one jurisdiction or in a multiplicity of jurisdictions was proper, to cases where the trial convenience itself was at issue. That is, where both sides were before the Court and the parties could discuss *inter*

29. 314 U. S. 44 (1941).

alia, the convenience of witnesses, in addressing themselves to what was intended to be a purely discretionary function of the judge.

Furthermore, the Attorney General's offices had been afforded considerable opportunity to mention in its reports or in its testimony before Congress any different coverage desired than that stated expressly in §1404(a) itself. Chief Justice Vinson went into the legislative history of §1404(a) at great length in *United States* v. *National City Lines*.[30] The learned Justice stated:

> "• • • The Department of Justice in particular was informed: each United States Attorney received a copy of the drafts; a Department spokesman testified at the House hearing; the Attorney General was asked for an opinion by the Congressional Committee. The plain inference is either that the Government took no action with respect to the forthcoming alteration of the rule • • • or that a protest was made which Congress disregarded. Neither alternative would offer the slightest justification for overriding the unequivocal words of §1404(a) and the legislative history which establishes that Congress indeed meant what it said." (Footnotes omitted.)

Just as in the *National City Lines* case the court refused to state that the language in §1404(a) "any civil case" did not include antitrust cases so in the instant case the same logic requires denial of attempts to state that "in the convenience of the witnesses and the parties" means "solely to permit the instant appellant to be relieved of the consequences of bringing suit in a district in which the defendant would be extremely difficult to serve".

30. 337 U. S. 78 (1949) on pages 83 and 84.

C. The Language "[f]or the convenience of parties and witnesses, in the interest of justice" in §1404(a) Was Not Intended to Permit a Transfer of Venue for the Sole Purpose of Saving Respondent from the Running of the Statutory Period of Limitations.

Historically, §1404(a) was based upon the doctrine of "forum non conveniens", substituting the power to transfer for the power to dismiss in "forum non conveniens" cases. That doctrine was concerned with actions brought in a district of proper venue whose trial in the chosen district would be *more* burdensome to defendants and witnesses than to the plaintiff.

Although the respondent's moving papers do not raise the question of convenience of parties and witnesses, all the witnesses except the petitioner reside in the district from which transfer is sought. The papers on which the assessment was based are located at the office of the District Director of Internal Revenue at Philadelphia, Pa. The corporation, which it is claimed failed to pay the withholding taxes, is located in that City. All of its officers resided in Philadelphia or its environs and the books of that corporation were housed at its principle office. The trial of the action in Philadelphia would not be more burdensome to petitioner. Thus, the transfer cannot be said to be for the convenience of the witnesses.

In the instant case, the Statute of Limitations—six years—had run before an attempt to make service was even made. Therefore, it is more burdensome to the petitioner here to be asked to defend an action long after the claim accrued, allegedly, and after the period of limitations has run, than to come into the district in which

respondent brought his suit. Thus, the transfer cannot be said to be for petitioner's convenience at the trial.

Indeed, one consequence of a ruling by this Court that the section was intended to permit transfer in the instant case would increase the burdens on future defendants. If §1404(a) were held to intend that plaintiffs be permitted to bring actions in districts of proper venue just before the statutory period of limitations has run—without prior investigation of whether it is possible to notify a defendant of the suit by service—and subsequently, after the statutory period has run, move to transfer to the place where such service would have been attempted had such investigation been made, then the effect would be to convert the multiple venue granted by Congress into a tool of unjust harassment—whether by negligence or by design—in direct conflict with the policy of the statutory period of limitations. Petitioner contends that Congress could not have intended to create §1404(a) for such a purpose, and every evidence shows that Congress did not so intend it.

It may be argued that the *Goldlawr* decision[31] by this Court permits that precise result where the harassment is caused by original suit in the district of wrong venue, rather than in the district of proper venue, where the defendant also cannot be served within the period of limitations. The argument that it would appear unjust for the greater error to be curable under §1406(a) while the lesser error would not be curable under §1404(a) is quite persuasive until subjected to analysis.

The respondent heretofore contended that the intention of Congress, which this Court read in the 1949 Congress' amendment to §1406(a), is identical with the intention

31. 369 U. S. 463 (1962).

which governed the earlier Congress in its promulgation of §1404(a). That, in effect, would mean that the words

> "or if it be in the interest of justice" →

added by that amendment to §1406(a), in 1949, means the same as the words

> "for the convenience of parties and witnesses, in the interest of justice"

in the original §1404(a).

It is the petitioner's position that this Court is not concerned solely with whether there are similarities of policy considerations behind *Goldlawr* with those that *might* be applied to this close, but not identical, case. This Court is necessarily concerned with whether a construction of §1404(a) in the same manner as the *Goldlawr* case construction is a permissible translation of the intent of a different Congress enacting a wholly different section.

The respondent's position is that—insofar as a plaintiff, bringing an action in the district of proper venue under a multiple venue statute just before the period of limitations has run, is concerned—the words of the 1949 amendment to §1406(a) mean the same as the words

> "for the convenience of parties and witnesses, in the interest of justice * * *."

Petitioner's position is that such a reading would (1) strain the plain meaning of the language beyond the limits warranted by ordinary principles of statutory construction, and (2) be completely unsupported by the legislative history of this language.

[i]

The plain language of §1404(a) shows that it was intended to reach situations in which transfer was both in the interest of justice and for the convenience of witnesses and parties at trial.

Respondent's strained attempt, to persuade this Court that the Congress, when it enacted the words "[f]or the convenience of parties and witnesses, in the interest of justice" did *not* mean "for the convenience * * * and in the interest of justice" but meant instead "for the convenience * * * *or* in the interest of justice", must fail.

For this Court to so rule, it would have to disregard the knowledgeable report of the Reviser:

> The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, *and further*, that it is in the interest of justice to do so. 28 U.S.C. §1404(a) Reviser's Note, emphasis added.

[ii]

The legislative history of §1404(a) demonstrates that it was intended for trial convenience of witnesses and parties rather than to extend the period of limitations in right venue cases.

This Court left little doubt of the value to be given to the reviser's note. It said in *United States* v. *National City Lines*:[32]

32. 337 U. S. 78 (1949) on page 81.

> "* * * the Government urges us to disregard the reviser's notes which were printed in the House Reports. We cannot accept this position for the reason discussed in our previous decisions today. The reviser's notes are so obviously authoritative in perceiving the meaning of the Code that the Government itself, in discussing a section other than §1404(a), refers to them in its brief in this case. * * *"

The note requires the moving party to supply facts to establish that a transfer would be for the convenience of the parties and witnesses and, in addition, that the transfer was in the interest of justice. Mr. Justice Jackson, in *Gulf Oil Corp.* v. *Gilbert, supra,* detailed the facts to be supplied.[33] Appellant's papers in the District Court for transfer under §1404(a) appear on page 30a and on pages 33a and 34a. *The sole statement concerning transfer appears on page 30a.* That reads:

> "The Statute of Limitations on the claim on which this action is based expired May 31, 1962, and, accordingly, it would be a denial of justice not to allow this change as the plaintiff would then be barred from bringing this action."

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33. He said on page 508:

> "* * * An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; * * * and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. * * *"

Not one word is said concerning the convenience of parties or witnesses, nor was any justification offered for refusal to grant petitioner's many demands for a hearing permitted by law to establish that he was not liable for the assessment, the basis of the action,[34] except that a criminal proceeding was pending against third persons. The Government never questioned petitioner's conduct, nor did it claim that he was in any way associated with the criminal proceeding.[35]

D. Neither the text of §1404(a) nor its legislative history justifies a reversal of the District Court's conclusion that it had no power to entertain the Government's motion to transfer because of the absence of personal jurisdiction of the defendant, nor should the Court of Appeals have sent the case back to the District Court to exercise its discretion with respect to a motion wherein the sole reason given for the transfer under §1404(a) was to extend the statute of limitations.

2. The Decision Below Concerning the Need for Personal Jurisdiction of the Defendant when, Considering a Motion to Transfer, Conflicts with the Decision by the District of Columbia Court of Appeals and the Decision of District Courts in the Second, Sixth, Seventh and Eighth Circuits. It is Supported, However, by a Decision of the Court of Appeals for the Fifth Circuit.

A review of the cases shows that petitioner's views have been supported in *North Branch Products Inc.* v. *Fisher*, 284 F. 2d 611, D.C. Cir. 1960; *Kings Bros. Productions*,

34. 18a and 20a.

35. 21a and 32a.

Inc. v. *R.K.O. Teleradio Pictures, Inc.*, 208 F. Supp. 271 (S.D. N. Y., 1962); *Fistel* v. *Beaver Trust Co.*, (S.D. N. Y. 1950), 94 F. Supp. 974; *Hargrove* v. *Louisville & N.R. Co.*, 153 F. Supp. 681 (W.D. Ky., 1957); *Rogers* v. *Halford*, 107 F. Supp. 295 (1952); *Hill* v. *Upper Mississippi Towing Corp.*, 141 F. Supp. 692 (D. Minn. 1956); *Wilson* v. *Kansas City Southern Ry. Co.*, 101 F. Supp. 56 (W.D. Mo. 1951).

The Third Circuit's view is in agreement with the 5th Circuit as expressed in *Koehring Company* v. *Hyde Construction Company*, 324 F. 2d 295 (1963).

The conflict in the circuits, with respect to the need of the transferor court to have jurisdiction over the person of the defendant when relief under §1404(a) is requested, suggests a review of that question by this Court. Furthermore, petitioner could not find a single case which permits a transfer under §1404(a) solely for the purpose of avoiding the effect of the Statute of Limitations.

Conclusion

It is submitted that the conclusion reached by the United States Court of Appeals, below, to the effect that the District Court had the power to consider respondent's motion on the merits to transfer the action under §1404(a), without that Court having acquired jurisdiction over the person of the defendant, is neither sound, nor supported by the provisions of that section and its legislative history. It is further respectfully submitted that the Court of Appeals erred in returning the said motion to the District Court for further consideration when there was nothing in the motion papers from which the District Court could determine whether the requested transfer was "[f]or the convenience of parties and witnesses, ..."

Wherefore, your petitioner respectfully prays that a writ of certiorari should be granted.

Respectfully submitted,

I. ARNOLD ROSS,
Counsel for Petitioner.

Dated: May 27, 1964.

I. ARNOLD ROSS,
DANIEL WILKES,
RAYMOND L. SHAPIRO,
Of Counsel.

Appendix "A"

Opinion of the United States Court of Appeals for the Third Circuit

By STALEY, *Circuit Judge*.

The United States filed a civil action in the District Court for the Eastern District of Pennsylvania to recover taxes it alleged were due and owing from the defendant, Morton Berkowitz. The complaint averred that a penalty assessment in the amount of $63,653.73 had been made against the defendant on May 31, 1956, because he was a responsible officer of a corporation which had become delinquent in the payment of withholding taxes. The suit was filed on May 14, 1962, just seventeen days prior to the expiration of the applicable statute of limitations. Internal Revenue Code of 1954, § 6502(a)(1), 26 U.S.C.A. § 6502 (a)(1). A copy of the complaint and summons were served upon an individual at the Philadelphia address of the defendant as shown in the records of the Internal Revenue Service.[1] Thereafter, the defendant filed a motion to dismiss the complaint or to quash the return of summons on the grounds that he was a resident and citizen of the state of New York and had not been properly served with process. The motion was supported by an affidavit stating that he had resided in New York since January of 1960 and had abandoned both his Philadelphia residence and his intention to make that residence his domicile.

Since the period provided in the statute of limitations had by this time expired, the Government filed a motion to transfer the action to the District Court for the Eastern

1. The defendant states that he had formerly resided at this address with his sister. The return on the service of the writ indicates that it was served on his brother-in-law at that address.

District of New York, pursuant to 28 U.S.C. § 1404(a). That section provides:

> "§ 1404. Change of venue.
>
> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The district court determined that it had no power to effect a transfer under § 1404(a) because it had not acquired jurisdiction over the person of the defendant. 214 F. Supp. 579 (E.D.Pa., 1962). The court acknowledged that this had been held immaterial in Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962), but it limited that decision to transfers under § 1406(a). Accordingly, an order was entered denying the motion to transfer and granting the motion of the defendant to quash the return of process.

Consequently, the United States filed another motion to transfer, pursuant to 28 U.S.C. § 1406(a). That section provides:

> "§ 1406. Cure or waiver of defects.
>
> "(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

The district court reasoned that because the tax liability arose in the Eastern District of Pennsylvania, and as the tax returns were filed there, venue was properly laid in

that district under 28 U.S.C. § 1396.[2] The court concluded that the action could not be transferred under § 1406(a) which, by its terms, is applicable to a case laying venue in the wrong division or district. 215 F. Supp. 615 (E.D.Pa., 1963).

The Government filed timely notices of appeal from each of these orders and, as a precautionary measure, filed a petition for a writ of mandamus to compel the district court to exercise its discretion to transfer this action. We granted a rule to show cause on this petition and consolidated it with the proceedings on the appeals.

We are faced with the threshold question of whether we have jurisdiction to review the orders of the district court by way of appeal. Several decisions of this court, as well as those of other circuits, have held that an order either granting or denying a motion to transfer is not appealable. Swindell-Dressler Corp. v. Dumbauld, 308 F.2d 267 (C.A.3, 1962); All States Freight, Inc. v. Modarelli, 196 F.2d 1010 (C.A.3, 1952); Paramount Pictures, Inc. v. Rodney, 186 F.2d 111 (C.A.3), cert. denied, 340 U. S. 953 (1951); Lemon v. Druffel, 253 F.2d 680 (C.A.6), cert. denied, 358 U. S. 821 (1958); Ford Motor Co. v. Ryan, 182 F.2d 329 (C.A.2), cert. denied, 340 U. S. 851 (1950). Of course, the rationale underlying these decisions is that, because such orders are interlocutory in character they are not appealable as "final decisions" under 28 U.S.C. § 1291, and are not within the class of decisions made appealable by 28 U.S.C. § 1292. However, the orders deny-

2. "§ 1396. Internal revenue taxes.

"Any civil action for the collection of internal revenue taxes may be brought in the district where the liability for such tax accrues, in the district of the taxpayer's residence, or in the district where the return was filed." 28 U.S.C.A. § 1396.

ing transfer in the case at bar are unique, for they effectively terminate this lawsuit: the action in the Eastern District cannot be further prosecuted since the defendant cannot be properly served there, and the defendant can assert the statute of limitations as a defense to a new suit elsewhere. Though the district court has not dismissed the complaint, it has quashed the return of process in the first of its orders denying transfer. Thus, under the circumstances here, these orders have "sufficient indicia of finality for us to hold that the judgment is properly appealable at this time." Brown Shoe Co. v. United States, 370 U.S. 294, 308 (1962).[3] See also Corey v. United States, U. S. (Dec. 9, 1963); Hohensee v. News Syndicate, Inc., 286 F.2d 527, 529, n.2 (C.A.3, 1961), vacated and remanded on other grounds, 369 U.S. 659 (1962).

On the merits, the Government argues that under the decision of the Supreme Court in Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962), jurisdiction over the person of the defendant is not a prerequisite to the power of the district

3. Because the Government has filed a precautionary petition for a writ of mandamus, the foregoing discussion as to the mode of our review is, in large measure, academic since we have jurisdiction to consider the merits of the controversy in any event. In this regard, compare Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514 (C.A.4, 1955), where review was sought solely by way of mandamus. In response to a contention that review should have been by appeal, Judge Parker noted that no order of dismissal had been entered and said:

> "* * * We think, however, it would be an idle formality fraught with unnecessary delay to dismiss the present application or merely direct the entry of an order of dismissal so that libellants might appeal from it. We think that we should come at once to the real question at issue in the case so that the litigation may go forward without needless delay. We can do this because of our power to issue the writ of mandamus in aid of our appellate jurisdiction * * *." 218 F.2d at 517.

court to transfer this case either pursuant to § 1406(a) or under § 1404(a). The major portion of the argument is devoted to § 1406(a), although it is recognized that the finding of the district court that venue was properly laid in the Eastern District of Pennsylvania presents a serious obstacle to transfer under that section. However, the Government urges that though venue is technically proper in the Eastern District, this is nonetheless "a case laying venue in the wrong division or district" within the meaning of § 1406(a), because the defendant is not amenable to service there.

We find it unnecessary to consider the Government's novel and intricate contention that venue may be properly laid in a district and, yet, the case may be one "laying venue in the wrong district" under § 1406(a), for we think that § 1404(a) clearly authorizes the transfer of this civil action. As we have seen, that section provides that for the convenience of the parties and witnesses and in the interest of justice, an action may be transferred to any district where it might have been brought. The district court believed that it was without power to transfer this case under § 1404(a) in the absence of jurisdiction over the person of the defendant. But Goldlawr, Inc. v. Heiman, supra, conclusively settled that question. It is true that *Goldlawr* involved an interpretation of § 1406(a). Nevertheless, we think that its rationale applies equally to § 1404(a), for these are companion sections, remedial in nature, enacted at the same time, and both dealing with the expeditious transfer of an action from one district or division to another. See Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514 (C.A.4, 1955). As the Supreme Court observed in *Goldlawr:*

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> "The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not. The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years—that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits." 369 U.S. at 466-467.

Of course, this does not mean that this action must be transferred; we hold only that the district court has power to do so if it determines that the considerations set forth in § 1404(a) warrant transfer in the circumstances of this case.

The motions of the defendant to dismiss the appeals as well as the Government's petition for a writ of mandamus will be denied. The order of the district court denying transfer under 28 U.S.C. § 1404(a) will be reversed and it, together with the order denying transfer under 28 U.S.C. § 1406(a), will be remanded to the district court for further proceedings in conformity with this opinion.

Appendix "B"

Opinion of the United States District Court for the Eastern District of Pennsylvania

Joseph S. Lord, III, J. November 28, 1962

This is a suit to recover a penalty in the amount of $63,653.75, the assessment having been made on May 31, 1956, against the defendant by the District Director of Internal Revenue of Philadelphia, Pennsylvania. The complaint was filed on May 14, 1962, 17 days short of the statute of limitations. See 26 U.S.C. §6502(a)(1).

At the time the assessment was made the defendant was living in Philadelphia and service of the complaint was attempted at the Philadelphia address at which the defendant had been living. In the meantime, however, and before the filing of the complaint, defendant had married and moved to Brooklyn. The defendant had moved to dismiss on the ground that there has been no proper service and the government has moved to transfer the action to the United States District Court for the Eastern District of New York under the provisions of 28 U.S.C.A. §1404(a).

There is no question, and the government has conceded, that there has been as yet no proper service upon the defendant and that this court has acquired no jurisdiction over the person of the defendant. The government contends, however, that the "interest of justice" requires the transfer of the suit to a jurisdiction in which the defendant can be served. It is, of course, apparent that if the suit is dismissed a new action in the proper district is now barred by the statute of limitations.

In Hohensee v. News Syndicate, Inc., 286 F. 2d 527 (C.A. 3, 1961), the Court of Appeals for this Circuit held that a district court was without power to transfer under

28 U.S.C.A. 1406(a) a cause of action laid in an improper venue where the court had not acquired jurisdiction over the defendant by proper service. A contrary result had been reached as to a libel in rem in Internatio-Rotterdam, Inc. v. Thomsen, 218 F. 2d 514 (C.A. 4, 1955). In Hohensee this circuit distinguished Internatio-Rotterdam on the ground that it was an admiralty action and that in admiralty a suit may be brought in a district where the libel could not be served at the time of filing if it was thought that property of the respondent would shortly come into the district.

The Court of Appeals for the Second Circuit in Goldlawr, Inc. v. Heiman, 273 F. 2d 729 (C.A. 2, 1960), reached the same result as Hohensee in a non-admiralty §1406 case. However, on April 30, 1962, the Supreme Court of the United States reversed the Second Circuit in Goldlawr, (369 U. S. 463) and held that an action in which venue was improperly laid and where the defendant had not been served could be transferred to a proper district where the defendant could be served. I cannot clearly discern the impact of Goldlawr on §1404(a), for that section is nowhere mentioned in the majority opinion. And, in my opinion, the problem reached by §1406 is different in kind from problems under §1404(a). The former was intended to prevent manifest injustice from the good faith failure to appreciate the sometimes illusive facts upon which venue frequently turns. The majority said in Goldlawr, 369 U. S. at page 466:

> "• • • The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the exist-

> ence of some elusive fact of the kind upon which venue provisions often turn. * * *"

Section 1404(a), on the other hand, was aimed at *the trial* of an action in a more convenient forum; avoiding the finality of dismissal under traditional *forum non conveniens* concepts, albeit with broader criteria for determining trial convenience: cf: Norwood, et al. v. Kirkpatrick, 349 U. S. 29 (1955). All these factors tend to the belief that the underlying reasoning of Hohensee is still valid as applied to §1404(a).

On the other side of the coin, it should be noted that the Supreme Court pointed to Internatio-Rotterdam as representing one side of the split that existed among the circuits and approved the Internatio-Rotterdam rationale. That case read §1404(a) and §1406 together, and Judge Parker said, at page 516:

> "* * * We think, also, that the transfer falls within the letter and spirit of 28 U.S.C. §1404(a) as being a transfer 'for the convenience of parties and witnesses, in the interest of justice'. If there had been a service of process, no one would contest the power of the court to make the transfer under this section. We think that the power is no less because process has not been served, when failure to make the transfer may result not only in inconvenience but also in denial of justice to one of the parties.
>
> "It is argued that no order transferring the cause can be entered until jurisdiction has been acquired by service of process in an action in personam, or by seizure of the res in an in rem action. This argument fails, however, to distinguish between acquiring jurisdiction over the proceedings commenced before the court and acquiring jurisdiction over person or property; and it is the former, not the latter, with which we are concerned here. * * *

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> If service of process can be had only if the cause is transferred to another district, we see no reason why it should not enter an order transferring it for that purpose; and we think that the power is granted by the statutes quoted above. • • •"

The Supreme Court's approval of Internatio-Rotterdam in a §1406 case may lend support to a conclusion that it also approved what was said there about §1404(a). The dissenters[1] in Goldlawr, though, did not think so. Justice Harlan said, (369 U. S. at page 468):

> "• • • And it is incongruous to consider, as the Court's holding would seem to imply, that in the 'interest of justice' Congress sought in §1406(a) to deal with the transfer of cases where *both* venue and jurisdiction are lacking in the district where the action is commenced, while neglecting to provide any comparable alleviate measures for the plaintiff who selects a district where venue is proper but where personal jurisdiction cannot be obtained. • • •"

It is perhaps not unreasonable to assume that although the two dissenters disagreed with their majority brethren, they at least remained on speaking terms with them and I think are in a far better position to know what the majority meant than I am. Speaking for myself, then, I shall confine the Goldlawr holding to its own bounds, i.e., §1406. I will not extend it to §1404(a) until the Court of Appeals for this Circuit tells me to. The plaintiff's motion to transfer under §1404(a) will be denied.

The defendant's motion to dismiss will be denied, but since it is conceded that no proper service was made, I will treat the motion to dismiss as a motion to quash the return of service and so treating it will grant the motion.

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[1] Justices Harlan and Stewart.

Appendix "C"

Opinion of the United States District Court for the Eastern District of Pennsylvania of March 27, 1963

Joseph S. Lord, III, J. March 27, 1963

The present action involves a suit to reduce defendant's tax liability to judgment. The tax liability arose in the Eastern District of Pennsylvania, and the tax returns appear to have been filed in this District. Hence, venue was properly laid here under 28 U.S.C. §1396. However, defendant now lives in Brooklyn and cannot be served here. The statute of limitations [26 U.S.C. §6502(a)(1)] has run, and plaintiff has moved to transfer the action to the Eastern District of New York under 28 U.S.C. §1406(a). That Section provides:

> "(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

The plaintiff argues that although venue is statutorily proper, it is in reality not proper because in a suit in personam proper venue contemplates the ability to serve the defendant and proceed to a determination on the merits. A simple example will suffice to demonstrate the speciousness of this argument. Under 28 U.S.C. §1391(a) venue may be laid in the district where all of the plaintiffs or all of the defendants reside. Thus, a Philadelphia plaintiff injured in New Jersey by a New York resident would have proper *venue* in the Eastern District of Pennsylvania, although it might not be possible to obtain jurisdiction over defendant's person. It was never within the contem-

plation of Section 1406(a) that if such a suit were filed in the Eastern District of Pennsylvania with admittedly proper venue it could be transferred under that Section, which deals only with improper venue, to New York so that service could be obtained. Since venue here was proper there is no room to invoke the provisions of 28 U.S.C. §1406(a). The plaintiff's motion is denied.

Appendix "D"

Judgment of the United States Court of Appeals

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present—Staley and Ganey, Circuit Judges; and Nealon, District Judge.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of November 28, 1962 denying plaintiff's motion to transfer under 28 U.S.C. 1404(a) be, and it is hereby reversed, and it, together with the order of March 27, 1963 denying plaintiff's motion to transfer under 28 U.S.C. 1406(a), be, and they are hereby remanded to the District Court for further proceedings in conformity with the opinion of this Court.

Attest:
Ida O. Creskoff
Clerk

February 5, 1964